CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 222.

LUCIAN WOODWORTH, FRANK D. BROWN, AND GEORGE N. CLAYTON, PLAINTIFFS IN ERROR AND APPELLANTS,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JANUARY 8, 1901.

(18,014.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 31, 1901.

1 United States Circuit Court of Appeals, Eighth Circuit.

LUCIAN WOODWORTH, FRANK D. BROWN, and GEORGE N. CLAYTON, Plaintiffs in Error,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant in Error.

LUCIAN WOODWORTH, FRANK D. BROWN, and GEORGE N. CLAYTON, Appellants,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Appellee.

On certificate from the United States circuit court of appeals for the eighth circuit.

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 27th day of December, 1900, hereby certifies that upon the record on file in said court in the above-entitled causes wherein Lucian Woodworth, Frank D. Brown and George N. Clayton are plaintiffs in error and The Northwestern Mutual Life Insurance Company is defendant in error, and Lucian Woodworth, Frank D. Brown and George N. Clayton are appellants and The Northwestern Mutual Life Insurance Company is appellee, and which causes are now pending before this court on writ of error to, and appeal from the circuit court of the United States for the District of Nebraska, the following facts appear, namely:

On August 26, 1896, the Northwestern Mutual Life Insurance Company filed its bill of complaint in the circuit court of the United States for the district of Nebraska against Lucian Woodworth and others to foreclose a mortgage, given by Woodworth and his wife to said company, upon certain real estate situated in the State of Nebraska. A decree on said bill was entered on December 3, 1896, in said circuit court, foreclosing the mortgage, directing that a master in chancery of the court sell the premises and upon confirmation of the sale by the court execute a deed to the purchaser and ordering that the purchaser of the premises at said sale be put in possession thereof and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, should deliver possession to the purchaser on
2 production of the master's deed of said premises and a certified copy of the order confirming the report of said sale, after such order had become absolute. On February 14, 1898, said real estate was sold by the master under said decree and was purchased at said sale by the Northwestern Mutual Life Insurance Company for $39,152, a sum less than the amount of the debt secured by the mortgage and the costs in the suit. The master made his report of

sale to the court on February 15, 1898. On March 15, 1898, said circuit court confirmed said report of sale, directed that the master convey said real estate to the purchaser at said sale, awarded a writ of possession to put said purchaser in possession thereof and rendered a deficiency judgment for the sum of $2,696.90 and interest in favor of the Northwestern Mutual Life Insurance Company and against said Woodworth. On March 30, 1898, said Woodworth was allowed an appeal from this order of confirmation to the United States circuit court of appeals for the eighth circuit and thereafter, on April 8, 1898, he filed his appeal bond in the sum of $5,500 with Frank D. Brown and George N. Clayton as sureties thereon, which bond was conditioned for the payment of "all damages and costs which it (the Northwestern Mutual Life Insurance Company) may incur by reason or on account of said appeal" and worked a supersedeas of the order of confirmation. The United States circuit court of appeals on January 24, 1899, affirmed said order of confirmation of sale and on March 29, 1899, its mandate was duly issued to, and filed in said circuit court. On June 19, 1899, the deficiency judgment and the costs taxed in said cause in the United States circuit court of appeals were fully paid and satisfied. On September 16, 1899, the defendant in error, The Northwestern Mutual Life Insurance Company, filed its petition in said circuit court against Lucian Woodworth, and the sureties on said appeal bond, Frank D. Brown and George N. Clayton, alleging, among other things,
3 that the possession and use of said real estate was withheld from said company by reason of the superseding of the order of March 15, 1898, during the pendency of the appeal therefrom, that the value of such use and possession during the pendency of said appeal amounted to $3,750, and praying that Woodworth and the sureties Brown and Clayton be cited to appear and show cause why judgment *judgment* should not be summarily entered against them for said $3,750 and interest and costs. On September 16, 1899, an order to show cause against said Woodworth, Brown and Clayton was made on said petition as prayed for therein and on October 2, 1899, they filed their showing in resistance to said petition, alleging that "damages for the rents and profits of the premises, or use and detention thereof pending appeal, are not recoverable on a supersedeas bond, and that the bond in question was not given as security, or for the payment of rents and profits, or the use or detention of the property pending appeal" and praying for the dismissal of said petition. On December 9, 1899, said circuit court entered a judgment and decree against the plaintiffs in error, Woodworth, Brown and Clayton, as prayed for in said petition. Afterwards, in due season, to wit, on January 31, 1900, said last-named judgment and decree having been rendered on December 9, 1899, the record in the proceedings on said petition was removed by writ of error and also by appeal to the United States circuit court of appeals for the eighth circuit where it still remains, the cause being as yet undecided.

And the said United States circuit court of appeals hereby certi-

es, that to the end that it may properly decide said case, it desires he instruction of the Supreme Court of the United States upon the ollowing question or proposition of law arising therein which is uly raised and presented by the record in said case, said question being as follows:

Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution f a deed and delivery of possession thereof to the purchaser entitled fter that order has been affirmed on the appeal to recover as damges for the breach of the obligation of the bond the value of the se and possession, that is to say in this case, the rents and profits f the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and he appeal in which it was allowed?

In witness whereof, the undersigned judges of the said United States circuit court of appeals for the said eighth circuit have hereunto set their hands, this twenty-seventh day of December, 1900, at St. Louis, Missouri, and hereby order and direct that the foregoing certificate be filed in said circuit court of appeals, and by the clerk of said court be duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
ELMER B. ADAMS,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

5 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the cases of Lucian Woodworth *et al.*, plaintiffs in error, *vs.* The Northwestern Mutual Life Insurance Company, No. 1424, December term, A. D. 1900. and Lucian Woodworth *et al.*, appellants, *vs.* The Northwestern Mutual Life Insurance Company, No. 1425, December term, A. D. 1900, was duly filed and entered of record in my office by order of said circuit court of appeals and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this twenty-seventh day of December, A. D. 1900.

JOHN D. JORDAN,
Clerk United States Circuit Court of of *Appeals for the Eighth Circuit.*

[Endorsed:] U. S. circuit court of appeals, eighth circuit. December term, 1900. Nos. 1424 and 1425. Lucian Woodworth *et al.*, plaintiffs in error and appellants, *vs.* Northwestern Mutual Life Insurance Company. Certificate of a question to the Supreme Court of the United States. Filed Dec. 27, 1900. John D. Jordan, clerk.

Endorsed on cover: Certificate. File No. 18,014. U. S. C. C. of appeals, eighth circuit. Term No. 222. Lucian Woodworth, Frank D. Brown, and George N. Clayton, plaintiffs in error & appellants, *vs.* The Northwestern Mutual Life Insurance Company. Filed January 5th, 1901.

No. 222.
Brf. of Baldwin for P. E.
Filed Feb. 18, 1902.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

LUCIAN WOODWORTH, FRANK D. BROWN and GEORGE N. CLAYTON, *Plaintiffs in Error and Appellants.*

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error and Appellee.*

No. 222.

ON A CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHT CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

JOHN N. BALDWIN,
Attorney for Plaintiffs in Error.

Omaha Printing Company.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

LUCIAN WOODWORTH, FRANK D. BROWN AND GEORGE N. CLAYTON, *Plaintiffs in Error and Appellants,*

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error and Appellee.*

No. 222.

ON A CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

I.

STATEMENT OF FACTS.

This cause is now brought before this Court on a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit. The suit originally was brought by the Northwestern Mutual Life Insurance Company against Lucian Woodworth, as principal, and Frank D. Brown and George N. Clayton, as sureties, on a supersedeas bond, to recover damages and costs which the insurance

company alleged had been sustained by reason of an appeal taken by Lucian Woodworth from a decree of foreclosure and sale of real estate in Omaha, Nebraska.

The case was tried before the Circuit Court of the United States for the District of Nebraska, Hon. W. H. Munger presiding, and judgment rendered in favor of the plaintiff. A writ of error was sued out and also an appeal to the United States Circuit Court of Appeals for the Eighth Circuit. Both proceedings were adopted because of the uncertainty as to the proper method of procedure.

The case was submitted in due course to the United States Circuit Court of Appeals at St. Louis, and after considering the case, the Court of Appeals certified one of the questions or propositions of law arising therein to this Court.

The Statement of Facts, together with the question certified, is found on pages 1 to 3 of the Certificate, as follows:

The United States circuit court of appeals for the eighth circuit, sitting at the city of St. Louis, Missouri, on this 27th day of December, 1900, hereby certifies that upon the record on file in said court in the above-entitled causes wherein Lucian Woodworth, Frank D. Brown and George N. Clayton are plaintiffs in error and the Northwestern Mutual Life Insurance Company is defendant in error, and Lucian Woodworth, Frank D. Brown and George N. Clayton are appellants and the Northwestern Mutual Life Insurance Company is appellee, and which causes are now pending before this court on writ of error to, and appeal from the circuit court of the United States for the District of Nebraska, the following facts appear, namely:

On August 26, 1896, the Northwestern Mutual Life Insurance Company filed its bill of complaint in the circuit court of the United States for the District of Nebraska against Lucian Woodworth and others to foreclose a mortgage, given by Woodworth and his wife to said company, upon certain real estate situated in the State of Nebraska. A decree on said bill was entered on December 3, 1896, in said circuit court, foreclosing the mortgage, directing that a master in chancery of the court sell the premises and upon confirmation of the sale by the court execute a deed to the purchaser and ordering that the purchaser of the premises at said sale be put in possession thereof and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, should deliver possession to the purchaser on production of the master's deed of said premises and a certified copy of the order confirming the report of said sale, after such order had become absolute. On February 14, 1898, said real estate was sold by the master under said decree and was purchased at said sale by the Northwestern Mutual Life Insurance Company for $39,152, a sum less than the amount of the debt secured by the mortgage and the costs in the suit. The master made his report of sale to the court on February 15, 1898. On March 15, 1898, said circuit court confirmed said report of sale, directed that the master convey said real estate to the purchaser at said sale, awarded a writ of possession to put said purchaser in possession thereof and rendered a deficiency judgment for the sum of $2,696.90 and interest in favor of the Northwestern Mutual Life Insurance Company and against said Woodworth. On March 30, 1898, said Woodworth was allowed an appeal from this order of confirmation to the United States circuit court of appeals for the eighth circuit and thereafter, on April 8, 1898, he filed his appeal bond in the sum of $5,500 with Frank D. Brown and George N. Clayton as sureties thereon, which bond was conditioned for the payment of "all damages and costs which it (the Northwestern Mutual Life Insur-

ance Company) may incur by reason or on account of said appeal" and worked a supersedeas of the order of confirmation. The United States circuit court of appeals on January 24, 1899, affirmed said order of confirmation of sale and on March 29, 1899, its mandate was duly issued to, and filed in said circuit court. On June 19, 1899, the deficiency judgment and the costs taxed in said cause in the United States circuit court of appeals were fully paid and satisfied. On September 16, 1899, the defendant in error, the Northwestern Mutual Life Insurance Company, filed its petition in said circuit court against Lucian Woodworth, and the sureties on said appeal bond, Frank D. Brown and George N. Clayton, alleging, among other things, that the possession and use of said real estate was withheld from said company by reason of the superseding of the order of March 15, 1898, during the pendency of the appeal therefrom, that the value of such use and possession during the pendency of said appeal amounted to $3,750, and praying that Woodworth and the sureties Brown and Clayton be cited to appear and show cause why judgment *judgment* should not be summarily entered against them for said $3,750 and interest and costs. On September 16, 1899, an order to show cause against said Woodworth, Brown and Clayton was made on said petition as prayed for therein and on October 2, 1899, they filed their showing in resistance to said petition, alleging that "damages for the rents and profits of the premises, or use and detention thereof pending appeal, are not recoverable on a supersedeas bond, and that the bond in question was not given as security, or for the payment of rents and profits, or the use or detention of the property pending appeal" and praying for the dismissal of said petition. On December 9, 1899, said circuit court entered a judgment and decree against the plaintiffs in error, Woodworth, Brown and Clayton, as prayed for in said petition. Afterwards, in due season, to wit, on January 31, 1900, said last named judgment and decree having been rendered on December 9, 1899, the record in the

proceedings on said petition was removed by writ of error and also by appeal to the United States circuit court of appeals for the eighth circuit where it still remains, the cause being as yet undecided.

And the said United States circuit court of appeals hereby certifies, that to the end that it may properly decide said case, it desires the instruction of the Supreme Court of the United States upon the following question or proposition of law arising therein which is duly raised and presented by the record in said case, said question being as follows:

Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser entitled after that order has been affirmed on the appeal to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed.

II.

ARGUMENT.

Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser entitled after that order has been affirmed on the appeal to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed?

We think the case of *Kountze vs. the Omaha Hotel Co.*, 107 U. S. 378, is decisive of the question certified to this court. The bond in the case at bar provides for the payment of all *damages and costs* which may be incurred by reason of said appeal. The bond in the Kountze case was much stronger and more binding in its language, for it provided for the payment of damages for *use and detention* of the property during the pendency of the appeal, also the *costs of suit and just damages for delay.* The bond in the case at bar merely covers the damages and costs which may be incurred by plaintiff on account of the appeal.

There was no attempt in the original mortgage to pledge the rents and profits. The building itself was deemed amply sufficient to secure the amount loaned. Insurance and Investment Companies loaning money always take sufficient security to cover default, litigation, trial, appeal and the time necessarily involved. If a man wants

to borrow $50,000 from any of these Companies, he has to give security valued at not less than $150,000. The Insurance and Investment Companies take all of these delays into consideration. The owner of the building was entitled to the rents, both at common law and under the Nebraska Statutes.

Sec. 55, Chapter 73, Compiled Statutes of Nebraska, is as follows:

Sec. 55. (Legal title in mortgagor.) In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof.

The mortgagor retains the legal title and *right of possession*, unless there be a stipulation to the contrary. Inasmuch as under the plaintiff's foreclosure proceedings it was not seeking the possession of the property and was not entitled thereto, but only to a sale of the mortgaged property, it could not suffer any damages until it had acquired that property, and this it could do only by purchase at a sale thereof and the delivery of the sheriff's or master's deed in pursuance thereof, ~~and the delivery of the sheriff's or master's deed in pursuance thereof.~~

Sec. 853 of Title 27 of Code of Civil Procedure, which title relates to foreclosure of mortgages, Compiled Statutes of Nebraska, page 1327, is as follows:

"Sec. 853. (Deed to purchaser—Effect.) Deeds "shall thereupon be executed by such sheriff, which shall "vest in the purchaser the same estate that would have "vested in the mortgagee if the equity of redemption had "been foreclosed, and no other or greater; and such deeds "shall be as valid as if executed by the mortgagor and

"mortgagee, and shall be an entire bar against each of "them, and all parties to the suit in which the decree for "such sale was made, and against the heirs respectively, "and all persons claiming under such heirs."

This statute has been interpreted by the Nebraska Supreme Court in the case of *Hoagland vs. Lowe*, 39 Nebr., 397, and *John A. Orr vs. Charles A. Broad*, 52 Nebr., 490. The Court in the latter case holding that a mortgage of real property in the State of Nebraska does not convey any title or vest any estate before or after conditions broken, but merely creates a lien on the property, and the mortgagor of the real property retains the legal title and is entitled to the possession thereof until confirmation of a sale under a decree of foreclosure of the mortgage *and a deed made pursuant thereto*, and such right of possession carries with it the proprietary interest in the rents and profits of the real estate.

Again, by the very decree in this case, the possession of the property in question was to remain in the mortgagor, and the mortgagee or purchaser at the sale was not to have possession, or be entitled to possession, until the production of the master's deed.

On page 1 of the Certificate, in the statement of facts, it is said, after stating the terms of the decree, that:

"A master in chancery of the court sell the premises, and upon confirmation of the sale by the court execute a deed to the purchaser and ordering that the purchaser of the premises at said sale be put in possession thereof and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, *should deliver possession to the*

purchaser on production of the master's deed of said premises."

So, by the terms of the decree itself, the possession of the premises in question, and consequently all rights and benefits, and all issues, rents and profits derived therefrom, belonged to the mortgagor until the production of the master's deed.

The mortgagor by taking his appeal is only exercising his legal rights. We cannot do better than to adopt the language as found in the Omaha Hotel Co. case, *supra.*

"In the case of a mortgage, the land, is in the nature of a pledge; and it is only the land itself—the specific thing—which is pledged. The rents and profits are not pledged: they belong to the tenant in possession, whether the mortgagor or a third person claiming under him. This is not only the common law, but it is the express statute law of Nebraska, which declares that 'in the absence of stipulation to the contrary, the mortgagor retains the legal title and right of possession.' The plaintiff, in this case, was not entitled to possession, nor to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing—the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him. Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not cov-

ered by reasonable insurance, and the like, probably might also be fairly covered by the bond. But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly:

The mere delay of the sale for the purpose of an appeal does not operate to the legal injury of the mortgagee. It does not suspend execution for the debt; he has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged, in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land. The debt may be prosecuted by a personal action against the debtor, and this may be the defendants in the suit, or some other person. The rule of Court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land have been applied, is a recent rule intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree for foreclosure and sale.

It often happens that the debt is not fully ascertained when a decree for sale and foreclosure is made; as where they are many outstanding bonds which have to be called in and verified. The sale in such cases is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt.

As it is the specific thing, the land itself, and not the rents and profits, that constitute the pledge, the delay of sale caused by the appeal, as before said, deprives the mortgagee of no legal right. It may be an incidental disadvantage or inconvenience, but in our judgment it is not

a legal damage *contemplated* by the appeal bond. We are aware that a contrary view has sometimes been taken at the circuit; but upon a full consideration of the subject we have come to the conclusion now expressed. The chances of actual deterioration and waste in certain classes of property are so great, that a bond in considerable amount may well be required, and if actual deterioration and waste supervenes, the amount may properly be recovered.

In addition to these general considerations, a careful examination of the 29th Rule will show that in cases like the present it does not, in terms at least, contemplate security for the use and detention of the property pending the appeal. The words are, "indemnity in all such cases (where the property in controversy necessarily follows the event of the suit) is only required in an amount sufficient to secure the sum *recovered* for the use and detention of the property, and the costs of the suit, and just damages for delay," etc. "The sum recovered for use and detention?" here referred to, means the sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower, and replevin, etc., and the phrase "just damages for delay" refers to those damages arising from the delay occasioned by the proceedings in error or appeal, which are properly a legal damage to the party delayed. We are thrown back, therefore, to a consideration of the nature of the particular case, to ascertain what those legal damages properly are. The words "use and detention" do not assist us, as they relate to a cause or recovery in the original judgment.

There is another consideration which relieves the conclusion which we have reached from any supposed hardship or injustice to mortgages. Courts of Equity always have the power, where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver, and pre-

serve not only the corpus, but the rents and profits for the satisfaction of the debt. When justice requires this course to be pursued, and it is resorted to by the mortgagee, it will give him ample protection. There is no necessity, therefore, in order to protect him from injury, that a party, in order to have the benefit of an appeal, should be obliged to give security to account for the intermediate rents and profits of his own property."

This case has been approved in the following cases:

The Sidney, 47 Fed., 260.

Banks vs. McGahan, 45 Fed., 28.

Trust Co., vs. M. K. & T. Ry., 36 Fed., 221 (226).

the court saying in the latter case "Suppose this foreclosure proceeding should pass to a decree and the defendant appeal, its bond on appeal would be no protection to the mortgagee in respect to rents and profits. This is settled in the case of *Kountz vs. Hotel Co.*"

This ruling has never been modified or criticised. It is the logical interpretation of the language of rule 29, Supreme Court Rules, under which rule Superedeas bonds are given. It is provided under section 853 of the Code of Civil Procedure of the State of Nebraska above quoted, that when sales are made under foreclosure of mortgages, the deed shall be issued and made by the Sheriff *Until this deed is issued, the title and right of possession rests and is vested in the mortgagor.* It is not until the deed passes that the purchaser at the sale is vested with any title. It is only upon the execution and delivery of the deed that the title passes from the mortgagor to the purchaser at the sale. The deed has never been issued in

this case. The appeal was taken from the order of confirmation of the sale.

In argument in the Court of Appeals an attempt was made to distinguish between an appeal from an order of confirmation of sale and an appeal from a decree. No such distinction can logically be made. The owner of property is entitled to the rents and profits of the same until final transfer of the title by the Master's deed. This precise point has been decided by the Supreme Court of Nebraska in the case of *Philadelphia Mortgage & Trust Co. vs. Gustus et al.*, 55 Neb. 433, (77 N. W. R. 1107). That was an action to foreclose a mortgage upon real estate. A decree was entered and a sale of the land had, and, on motion, an order of confirmation was entered in the district court. Objections to the confirmation were presented for the mortgagors, which, on hearing, were overruled, and from the order of confirmation the mortgagors appealed. In deciding the case the Supreme Court said:

"The appeal and bond, if they did not vacate the order of the district court, superseded, suspended, or rendered it inoperative. The purchaser acquired no rights, and the applicant was not divested of his title to and rights in the land. *Tootle vs. White*, 4 Neb., 401; *Bank vs. Green*, 8 Neb., 296; *Bank vs. Green*, 10 Neb., 133. All things remained as before the sale and subsequent order of the district court, and will so remain and exist until a decision in and by this court of the matter appealed. The order of the district court, by the perfection of the appeal, became ineffectual as to all other purposes for which it was made, and it certainly does not seem unfair to say that it was not of force or effect as against the right to

redeem; nor does it appear unwarranted to construe the section of the Code in its reference to time to have indicated the date when the order shall become forceful and of full operation, which it cannot until this court has so decreed."

See also the case of *Robert Huston vs. Alfred Canfield et al.*, 57 Neb., 345, and *Clark vs. M. K. & T. Trust Co.*, 59 Neb., 53.

The mortgagor was in possession of the property all during the pendency of the proceedings. No demand for possession or claim for the rents, issues and profits was made by the mortgagee. No action was taken until the original case was affirmed in the Court of Appeals and a deed issued, when, for the first time, a demand for the rents, issues and profits was made.

It is now well settled that "a mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises until he takes actual possession."

Teal vs. Walker, 111 U. S., 242.

Decisions covering cases in ejectment have been cited by counsel as overruling the principle established in the Kountze case. Even in such cases it has been questioned by this Court whether the bond covers rents and profits accruing pending the writ. *Roberts vs. Cooper*, 19 How. 373. But cases like the one at bar and cases in ejectment are clearly distinguishable by the court in the Kountze case *supra*, for it is there said:

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he

is entitled to immediate possession and to the reception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar or dollar's worth, is so much of the plaintiff's property of which he is deprived. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him."

The defendant in the original case, Mr. Lucian Woodworth, had the right to prosecute his appeal. It was one of the things in contemplation at the time of the execution and delivery of the mortgage. His title to the premises did not become divested until the deed was delivered. An order confirming a sale is not sufficient. At this point of time an appeal was taken. The mortgagor's legal title was not and could not be divested, and the title did not vest in the mortgagee or the purchaser at the sale until the deed was delivered.

"As between the mortgagor and mortgagee or purchaser under foreclosure of a mortgage, the owner of the equity of redemption is entitled to the rents which become due down to the period when the purchaser under the decree of sale becomes entitled to possession, and this possessory right accrues on the production to the occupant of the premises of the referee's or sheriff's deed."

Clason vs. Corley, 5 Sandf. 447.

"Until the deed is delivered, the rights of the parties remain unchanged."

Whalen vs. White, 25 N. Y. 462.

Harrigan vs. Golden, 41 App. Div. 423.

In the case of *Whalen vs. White, supra*, the Court of Appeals of New York, said:

"*Clason vs. Gorly*, (5 Sandf. S. C., 447) was a well-considered case, in which Judge Sanford, with his usual care, examined the rights of purchasers at judgment sales under decrees of courts upon foreclosure of mortgages before and after the confirmation of the sale, and the rights and liabilities of tenants who were parties to the foreclosure suit and bound by the decree. It was held in that case—Judges Duer and Bosworth concurring—that the owner of the equity of redemption in land mortgaged was entitled to the rents which became due down to the period when the purchaser under the decree of sale became entitled to the possession of the land; which right accrued upon the production to the occupant of the premises of the master's or sheriff's deed and a certified order confirming the report of the sale after it became absolute. * * * * * By the mere sale under the judgment in the foreclosure suit, no change of title was affected."

"The purchaser takes the rents from the time he receives his deed."

Mitchell vs. Bartlett, 51 N. Y., 447.

In this last case the deed was delivered on August 2nd, 1865, and it was contended that the deed related back and took effect so as to vest the legal title to the premises in the plaintiff as of the 1st day of November, 1864, subject to all rents and incumbrances thereon for taxes, assessments and other incumbrances accrued after that date, and that the plaintiff became entitled to the rents of the premises for the period intervening between November 1st, 1864, and August 2nd, 1865. But the Supreme Court would not allow this contention and dissented from the doctrine claimed, and decided that the legal title cannot

vest under a deed before its delivery under any circumstances.

We think that the case of *Gilman et al. vs. Illinois & Mississippi Telephone Co.*, 91 U. S. 603, is instructive and pointed in authority, and presents with great force the reasons for the rule with reference to the right of the mortgagor to receive and hold the rents, issues and profits until the deed is delivered and his possession has been taken from him. The Court, speaking by Mr. Justice Swayne, says:

"The civil law is the springhead of the English jurisprudence upon the subject of these securities. Originally, according to that jurisprudence, mortgages of the class to which those here in question belong vested the fee, subject to be divested by the discharge of the debt at the day limited for its payment. If default was then made, the premises were finally lost to the debtor. In the progress of time more liberal views prevailed, and the debt came to be considered as the principal thing, and the mortgage only as an incident and security. * * * * *

It would have been competent for the court *in limine*, upon a proper showing, to appoint a receiver, and clothe him with the duty of taking charge of the road and receiving its earnings, with such limit of time as it might see fit to prescribe. It might have done the same thing subsequently, during the progress of the suit. When the final decree was made, a receiver might have been appointed, and required to receive all the income and earnings until the sale was made and confirmed, and possession delivered over to the vendee.

Nothing of this kind was done. There was simply a decree of sale. The decree was wholly silent as to the possession and earnings in the meantime. It follows that neither, during that period, was in any wise affected by the action of the court. * * * * *

A mortgagor of real estate is not liable for rent while in possession. 2 Kent's Com., 172. He contracts to pay interest, not rent. In *Chinnery vs. Black*, 3 Doug. 391, the mortgagor of a ship sued for freight earned after the mortgage was given, but unpaid. Lord Mansfield said: 'Until the mortgagee takes possession, the mortgagor is owner to all the world, and is entitled to all the profit made.'"

We confidently submit that under the clear and undisputed rule of law as established by this Court, the parties to the bond in question cannot be made liable for the rents and profits accruing while the parties to this action were pursuing their legal rights and remedies. Such damages were never in contemplation and have never been allowed.

Respectfully submitted,

JOHN N. BALDWIN,

Counsel for Plaintiffs in Error and Appellants.

Supreme Court of the United States

OCTOBER TERM, 1901.

DUGALD WOODBURN, SARAH D. BROWN and GEORGE N. DEARTH, Partners as Brown and Dearth,
Plaintiffs in Error and Appellants,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error and Appellee.*
No. 208.

ON A CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

JOHN N. BALDWIN,
Counsel for Plaintiffs in Error and Appellants.

Gazette Printing Co.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

LUCIAN WOODWORTH, FRANK D BROWN AND GEORGE N. CLAYTON, *Plaintiffs in Error and Appellants,*

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *Defendant in Error and Appellee.*

No. 222.

ON A CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFFS IN ERROR AND APPELLANTS.

I.

The position of the Supreme Court of Nebraska on the question as to when the title passes and the right to rents and profits accrues, is established beyond question to be when the *sheriff's deed is made*, by the cases cited in the argument for appellant. Relying on the case of *Clark vs. Way*, 52 Neb., 204, of which the Court itself says in the opinion, "We eliminate the minor and less material

points, in the hope that the case may be so far simplified as to render its condition intelligible," appellee attempts by using language applicable to the peculiar conditions of this case to establish a proposition entirely at variance with the law as clearly laid down by an unbroken line of cases, decided since the *Clark vs. Way* case, (supra), and which are all found cited in the brief for plaintiffs in error. And the doctrine thus laid down in all these cases is clearly in accordance with all the well established legal principles with reference to the transfer of titles in lands.

In all the cases cited in our original brief, the Supreme Court of Nebraska has repeated and reiterated the statement that no title passes to the purchaser until the deed is made in pursuance of the sale.

In *Orr vs. Broad*, 52 Neb., 490, the court said:

"The plaintiff who purchased at the execution sale, by the confirmation thereof *and the deed made pursuant thereto*, was vested with such title and right as were in the judgment, debtor at the time the lien of the judgment attached to the land."

And again, on page 498, the court said:

"Accompanying the legal title and right to possession, the right to the rents and profits passed to the plaintiff; hence, from the date, November 19, 1891, the date of the confirmation of the execution sale and *deed of the sheriff to the plaintiff*, the legal title was in him, he had the right of possession and to collect the rents and profits of the real estate."

And again, in the latest announcement on this subject, *Clark vs. Trust Co.*, 59 Neb., 53, the court again approves of the language and doctrine laid down in *Orr vs.*

Broad, and quotes from that opinion the exact language above quoted from page 498.

The title passes when the deed is executed and delivered. The confirmation of the sale is but one of the steps in the transfer of the title, just as is the foreclosure of the mortgage and the sale under the decree. If the confirmation of the sale passes the title, where is the necessity for the deed?

It certainly would not be claimed that after title has passed, redemption could be made, and yet it has been distinctly held that during the pendency of an appeal from the order of confirmation and until the affirmance of the order of the lower Court, redemption can be made.

Co. vs. Gustus, 55 Neb., 435.

Neither by citation of authorities nor by argument has appellee shaken the position taken by the Supreme Court of Nebraska in the unbroken line of cases following *Orr vs. Broad*, 52 Neb., 490, and all decided long since the uncertain language as found in the *Clark vs. Way* case was used, and it must be conceded as the established law of the State of Nebraska that no title nor right to the rents and profits passes until the execution and delivery of the Master's deed, following the order of confirmation. To hold otherwise would take away one of the substantial rights of the mortgagor and put a penalty upon his right to appeal from the order of confirmation, which the law unmistakably gives him. In addition, outside of the law as found in Nebraska, we have cited in the last pages of

our original brief a line of authorities which establish the proposition beyond question that the title does not vest in the mortgagee, nor is the mortgagor's title divested, *until the deed is delivered.*

Counsel for appellee attempts to distinguish the New York cases cited from the case at bar because the Master's report of sale in foreclosure suits followed the execution and delivery of the deed. This of course could make no difference in the principle laid down by the cases and only strengthens the force of our argument that it is the execution and delivery of the deed by the Master which transfers the title and the right to the rents and profits, rather than any other step in the foreclosure proceedings. The deed in this case never having been executed or delivered and an appeal being taken from the order of confirmation, there never was in appellee any title to the property in question, and consequently there could be in him no right to any rents or profits that may have accrued upon the premises before the execution to him of the Master's deed.

II.

As to the scope and effect of the supersedeas bond, it must be apparent from a study of the cases cited by appellant that the bond never contemplated damages for rents and profits, even though it be conceded that the defendant in the case would be liable therefor. Judgment has been entered in this action against the principal and the sureties on this bond, which is clearly erroneous. In support of the contention that obligees of the bond would be so liable, appellee cites cases in ejectment, where an entirely different principle prevails.

There the plaintiff depends upon *title* as the foundation of his action. He is successful and the title is found to be in him. An appeal is taken and the bond might be said to contemplate (though this has been questioned) the damages he will suffer by being longer deprived of his property. But in the case at bar he has never held any title. He is merely setting in motion the machinery of the law under which, if successful, he hopes to establish a title for himself. So in such a case the bond could only contemplate such damages as are ordinarily incident to a suit of this nature. This distinction is clearly established in the Kountze case and the other cases cited in appellant's brief.

Even if it should be determined that the mortgagor is liable for the rents, issues, and profits pending an appeal from an order of sale or confirmation and before delivery of deed, it should never be held that such rents

could be recovered in an action upon a supersedeas bond. An independent action of some kind or character should be brought by the purchaser at the sale or the person entitled to the rents. No Federal Court has ever held that rents were recoverable as part of the damages for breach of the obligations of a supersedeas bond. The mortgagee or purchaser at the sale had ample and adequate legal remedies and could have protected their interests if they were affected or in jeopardy. If waste was about to be committed, impairing the security, they could have procured an injunction. If the security was inadequate, they could have had a Receiver appointed to take charge of the rents. Other proceedings, suits, or actions could have been instituted, but none was begun, brought, or adopted, and we submit that this Court should not extend the terms, obligations, or lawful purpose of a supersedeas bond to give, for their convenience, still another remedy.

Respectfully submitted,

JOHN N. BALDWIN,

Counsel for Plaintiffs in Error and Appellants.

In the Supreme Court of the United States.

October Term, 1901.

No. 222.

(18,014.)

LUCIAN WOODWORTH, FRANK D. BROWN AND GEORGE N. CLAYTON,
Plaintiffs in Error and Appellants,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant in Error and Appellee.

On a Certificate from the United States Circuit Court of Appeals, for the Eighth Circuit.

Brief for Defendant in Error and Appellee.

HOWARD KENNEDY, JR.,
Counsel for Defendant in Error and Appellee.

MAY IT PLEASE THE COURT:

In the statement of facts prepared by counsel for plaintiffs in error and appellants herein, it is said that this suit "originally was brought by The Northwest-

ern Mutual Life Insurance Company against Lucian Woodworth, as principal, and Frank D. Brown and George N. Clayton, as sureties, on a supersedeas bond, to recover damages and costs which the Insurance Company alleged had been sustained by reason of an appeal taken by Lucian Woodworth from a decree of foreclosure and sale of real estate in Omaha, Nebraska." Pp. 1, 2 of brief of plaintiffs in error and appellants.

This statement is not correct. The appeal in which the supersedeas bond was given was taken not from "a decree of foreclosure and sale," but from something very different, namely, an order confirming a judicial sale of real estate and directing the immediate execution of a deed and the delivery of the possession of the premises to the purchaser at such sale. The distinction between such a decree and such an order is a very real one, and is of vital importance in the determination of the question now presented to this court. It is a distinction which counsel for plaintiffs in error ignores, but which, if recognized, will completely harmonize the authorities upon which he relies, with the principle contended for by the defendant in error.

ARGUMENT.

The question certified to this court for decision requires a determination, first, of the effect had upon the respective rights of the parties by the order of confirmation from which the appeal was taken—which is a matter of local law; and, second, of the

scope and effect of the supersedeas bond—which is dependent solely upon the statutes of the United States in that behalf, and the rules of court adopted in pursuance thereof.

I

As to the effect upon the respective rights of the parties of the order of March 15, 1898, by which the circuit court confirmed the report of sale, directed that the master convey to the purchaser the real estate so sold, and awarded a writ of possession to put said purchaser in possession thereof. P. 2 of certificate.

In Nebraska the common law theory of mortgage does not obtain. It is provided by statute that, "In the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof." Sec. 55, Chapter 73, Compiled Statutes of Nebraska. The effect of this legislation, it is said by the supreme court of Nebraska, is to declare "that mortgages in this State shall be viewed only in the aspect created by and known to equity, simply as a pledge or security of a debt." *Kyger v. Ryley*, 2 Neb., 20, 25. That is to say, a mortgage of real estate creates a lien upon the mortgaged property but conveys no title and vests no estate, either before or after condition broken. The rents and profits belong to the mortgagor, or his successor in interest, until his rights thereto are terminated by the procedure provided by law. On this proposition there is no dispute.

In behalf of plaintiffs in error, it is insisted that the mortgagor's legal title to the mortgaged premises

is not and cannot be divested until the master's deed is delivered to the purchaser, and that until such time the mortgagor is entitled to receive and hold to his own use, the rents, issues and profits.

It is no doubt true that until the delivery of the master's deed the legal title to the premises remains in the mortgagor, but it is no less true that, in Nebraska, *upon confirmation of the sale*, the ownership of the premises and the incidents of ownership, including the right to the rents, issues and profits, become in equity vested in the purchaser, and that upon the subsequent execution and delivery of the master's deed the title thereby conveyed relates back to the date of the confirmation of the sale.

The general equitable rule goes even farther and carries the title back by relation to the date of the sale, so as to award to the purchaser the intermediate rents.

It is said by Judge Dillon, "It is true that no title passes until the sale is confirmed (*Williamson v. Berry*, 8 How., 546; *re O'Fallon*, 2 Dillon, 548). But when the sale is confirmed, if there are no equitable circumstances, and no statute to change the general rule, the rights of the purchaser relate back to the date of the sale, so as to entitle him to the rents and profits for the intermediate period." *Lathrop v. Nelson*, 4 Dillon, 194, 196. In the case just cited, the sale was made May 8, 1875, confirmed February 28, 1876, and a deed executed and delivered February 29, 1876. It not appearing that the delay in securing confirmation was attributable to the mortgagee, who was the

purchaser at such sale, it was held that he was entitled, as against the mortgagor's assignee in bankruptcy, to the rents and profits of the estate sold from the date of the sale.

Such is the settled doctrine of the English courts, *Anson v. Towgood*, 1 Jac. & Walk., 637, 639; *Vesey v. Elwood*, 3 Dru. & War., 74; and of the following American authorities, among others, *Taylor v. Cooper*, 10 Leigh, 317; *Wagner v. Cohen*, 6 Gill, 97; *Stevenson v. Hancock*, 72 Mo., 612; *Wimpfheimer v. Prudential Insurance Co.*, 56 N. J. Eq., 585; *Jashenosky v. Volrath*, 59 Ohio St., 540.

In Nebraska, however, it is held that (although for some purposes the title relates back to the date of the mortgage) for the purposes of ownership and the right to the rents, issues and profits, the title of the purchaser relates back only to the date of the *confirmation* of the sale, and it is the value of the rents and profits from the date of the confirmation only that the Insurance Company is seeking in this case to recover.

Sales upon execution, in Nebraska, closely resemble judicial sales and are subject to examination and confirmation by the court; nor may the sheriff's deed issue until such sale has been first confirmed.

It has been held by the Nebraska supreme court that "under our statute governing sales of real property on execution, the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose process it was made, and until this is done the rights of the execution debtor are not cer-

tainly divested." *State Bank v. Green*, 10 Neb., 130, 134, 135. "On the other hand the sheriff who makes the sale is by law required and in duty bound to make a deed to the purchaser after the confirmation and order to the effect." *Phillips v. Dawley*, 1 Neb., 320, 322. "Under our code a purchaser of real estate at execution sale, who has paid the purchase price, and the sale has been confirmed, is the *equitable owner* of the property, and may compel the officer, if need be, to execute a deed therefor." *Lamb v. Sherman*, 19 Neb., 681, 687.

It is the doctrine of these cases that when an execution or judicial sale has been made and reported to the court, the purchase price paid, the report examined, the sale confirmed and delivery of a deed ordered, thereupon the *equitable ownership* of the property, with all of the incidents and rights of ownership, vests immediately in the purchaser, and that there is left in the execution debtor, or mortgagor, only the naked legal title which he thenceforth holds as a trustee for the benefit of the purchaser. The right to a conveyance, upon confirmation of sale, is immediate and absolute—in the absence of fraud or other ground of equitable interposition—and this right carries with it the right to the reception of the rents and profits.

The precise question has been passed upon by the supreme court of Nebraska, which expressly held that the title of a purchaser at a judicial sale relates back to the date of the order of confirmation, and that such purchaser is entitled to an accounting for the rents from such date.

Clark & Leonard Investment Co. v. Way, 52 Neb., 204, 207.

In the case just cited, there had been a judicial sale of mortgaged premises, subject to a prior mortgage, and such sale had been confirmed by the district court. From the order of confirmation the mortgagors appealed to the supreme court of the State, but after the case had been there pending for about a year, they dismissed their appeal. They then filed in the court below a motion for an order to require the purchaser at the sale to pay into court a certain sum alleged to remain due on his bid. From the order entered sustaining said motion and requiring him to pay a certain sum into court, the purchaser appealed to the supreme court. The purchaser urged as a reason for declining to pay any further money upon his bid, that pending the appeal he had paid certain taxes which during such period had become liens on the premises, and certain interest which had accrued on the mortgage subject to which he had bought; and that these amounts aggregated more than the balance due on his bid. The court disallowed these items, holding that upon the dismissal of the appeal—which was equivalent to the affirmance of the order from which the appeal was taken—the title of the purchaser, for all purposes, related back at least to the time of the order of confirmation made by the lower court; that the property became the purchaser's property from that time; and that the interest thereafter accruing on the first mortgage subject to which he purchased, and the taxes thereafter accruing, were

charges for which he and not the mortgagor was responsible. The court further held that "*undoubtedly the purchaser is entitled to an accounting for rents in such a case from the time of confirmation.*" *Id.*, p. 207.

The cases cited in the brief of plaintiffs in error are not in the least inconsistent with this doctrine.

In *Orr v. Broad*, 52 Neb., 490, the question arose as to the respective rights of the purchaser at an execution sale of mortgaged premises and the mortgagee who was in possession under an assignment of rents executed and delivered to him by the mortgagor the day after the levy of the execution. It was held that the purchaser at the execution sale had the superior right pending the foreclosure of the mortgage; that such purchaser by the confirmation of the execution sale and the deed made pursuant thereto was vested with such title and right as were in the judgment debtor at the time the lien of the judgment attached to the land; and that his "title and right thus acquired were liable to extinguishment by the foreclosure of the mortgage, a sale under the decree and confirmation thereof; but *until the occurrence of the last mentioned event* he had the legal title and right to possession." *Id.*, pp. 497, 498. In the brief of counsel for plaintiffs in error, emphasis is placed upon the statement that the purchaser at the execution sale became vested with the title and right of the judgment debtor by the confirmation of the sale, "and the deed made pursuant thereto." The delivery of the deed and the confirmation of the sale took place on the same date, so that the language used was entirely applicable to

the facts of that case but cannot be tortured into a repudiation of the doctrine of relation previously laid down by the court.

The cases of *Clark v. M. K. & T. Trust Co.*, 59 Neb., 53, and *Huston v. Canfield*, 57 Neb., 345, are similar to *Orr v. Broad, supra*, and follow that case.

Another case on which much stress is laid by counsel is *Philadelphia Mortgage & Trust Co. v. Gustus*, 55 Neb., 435. This was decided on an application to the supreme court for leave *to redeem from a foreclosure sale pending an appeal from the order of confirmation, with supersedeas.* The motion was allowed in accordance with the liberal construction accorded to statutes allowing the redemption of mortgaged premises. It is urged that this case decides that the owner of property is entitled to the rents and profits of the same until final transfer of the title by the master's deed. We do not so read the decision. The only thing decided by the court and all that could be decided is that where an order confirming a sale under a decree of foreclosure has been superseded by the execution and approval of a proper bond, the mortgagor may redeem from such sale at any time prior to the decision of the appellate court, affirming the order of confirmation. The appeal and the bond given to supersede the order appealed from were effective to suspend the execution of the order and to render it inoperative *during the pendency of the appeal.* While so suspended, redemption was allowed under the statute. But this holding does not disaffirm the view that when the supersedeas is discharged by

the dismissal of the appeal or the affirmance of the order of the lower court, the order appealed from becomes effective and the rights it confers become operative as of the date of such order.

In none of these cases is there any reference to the doctrine of relation and none of them announces or applies any principle which is inconsistent with that doctrine as laid down in *Clark & Leonard Investment Co. v. Way, supra.*

Neither do the cases from the United States courts cited in behalf of the plaintiffs in error in any wise conflict with this view. They simply declare and enforce the general equitable doctrine of mortgage, a doctrine which the defendant in error does not dispute nor question.

In *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S., 603, 23 L., 405, it was held that where mortgages of a railroad gave to the mortgagees the right to intervene and take possession of the road and receive its income and earnings, but the mortgagees did not exercise that right, and in the suit brought to foreclose the mortgages no order was made affecting the possession and earnings pending the foreclosure, the mortgagor retained the possession and the right to the income and that such income was liable to the creditors of the company, as if there had been no mortgage. The income in dispute was received between the time of the decree and the time of sale. The question as to the right of a purchaser of the road to receive the income earned after the

confirmation of the sale, was not before the court and was not passed upon.

In *Teal v. Walker*, 111 U. S., 242, 28 L., 415, it was held only that a mortgagor or his grantee in possession of mortgaged premises was not accountable to the mortgagee for rents received by him after default but prior to the sale in foreclosure, even though the mortgage provided that on default the mortgagee should be entitled to the possession, such a stipulation being contrary to the public policy of the state where the land was situated.

In *Kountze v. Omaha Hotel Co.*, 107 U. S., 378, 27 L., 609—a case which will be hereinafter further examined—the bond in suit was given on appeal from a *decree of foreclosure*, not from an *order confirming a sale*; and it is there shown that the right of a mortgagor to the possession of mortgaged premises, and to the rents and profits, is not affected by a decree of foreclosure and sale; that such a decree simply directs the sale of the land mortgaged, in order that the proceeds may be applied to the debt; and that "perception of rents and profits is the mortgagor's right until a final determination of the right to sell and a sale made accordingly." This certainly is far from holding that *after* a sale made and confirmed the mortgagor may continue to receive the rents and profits without being accountable therefor to the purchaser.

The effect of the order of confirmation must be determined by the laws of Nebraska, and therefore a consideration of the New York cases cited in behalf

of plaintiffs in error is perhaps unnecessary. But it may be observed that they too are easily distinguishable from the present case.

In New York (at the dates in question) the master's report of sale, in foreclosure suits, and, of course, the order of confirmation, *followed* the execution and delivery of the deed.

In *Clason v. Corley*, 5 Sandf., 447, the rent, which was sought to be recovered, fell due May 1, 1848, and was for the quarter ending on that day. The price of the premises was not paid until May 2, 1848, and the deed was executed and delivered the same day. An order of confirmation *nisi* was entered May 24, 1848, which became absolute June 2, 1848, or more than a month after the rent sued for became due.

In *Whalin v. White*, 25 N. Y., 462, it did not appear that the sheriff's deed had ever issued, or that the sale had been confirmed.

In *Mitchell v. Bartlett*, 51 N.Y., 447, the sale took place on October 4, 1864, at which time 10 per cent of the bid was paid, and a memorandum was signed by the purchaser agreeing that the balance of the purchase price should be paid and the deed delivered November 1, 1864. The deed was ready for delivery on the date named, but the purchaser was not ready with the purchase money and did not in fact pay the balance due nor receive his deed until August 2, 1865, the delay being due solely to his own fault. The court, properly, held that the contract of sale was not complete as to the purchaser until the whole price was paid and that the purchaser's title could relate

back only to the time when his right to receive the deed became absolute.

In *Harrigan v. Golden*, 41 App. Div., 423, it appears that the purchaser at a partition sale had paid 10 per cent of the purchase price and had signed a memorandum of purchase, but before the date fixed for the completion of the sale, a building situated upon the premises was destroyed by fire, thus causing a large depreciation in the rental value of the property and it further appears that the local authorities forbade the erection of another building to take the place of the one destroyed. It was held that the purchaser should not be compelled to complete his purchase, because the referee was not in position to give a title to all the property which he undertook to sell and which the purchaser rightfully supposed he was to receive.

And it is held in New York that the deed passes title to the purchaser at the moment of delivery although the report of sale be not made and confirmed until some time afterward, and that even if it were otherwise the subsequent confirmation of the sale would relate back to the delivery of the deed and give it effect from that time.

Fuller v. Van Geesen, 4 Hill, 171.

In *Nellis v. Lathrop*, 22 Wend., 121, 122, 125, an action for rents, it was held that where the defendant became entitled to receive a sheriff's deed of certain property on October 4, 1833, as redeeming creditor, but was delayed in obtaining the deed until February 28, 1835, by reason of an injunction ob-

tained by the assignor of plaintiff, such deed under the doctrine of relation must be deemed to have been delivered on October 4, 1833, and that plaintiff was divested of his title, as of that day.

It is the doctrine of these New York cases that the purchaser's title becomes effective *when his right to a deed accrues.* This accords with the contention of the Insurance Company in the present case. The confirmation of the sale establishes absolutely the purchaser's right to a deed. The order itself directs the immediate delivery of the deed and of the possession of the premises to the purchaser. Even without a specific direction to that effect the purchaser would be entitled to the possession of the premises.

Horn v. Volcano Water Co., 18 Cal., 141, 143.

Kershaw v. Thompson, 4 Johns. Ch., 609.

Accordingly, the effect of the order of confirmation of March 15, 1898, was to invest the Insurance Company with the complete equitable title to the premises, which title upon the subsequent delivery of the master's deed became effective, by relation, from the date of said order and entitled the Company to an accounting for the rents, issues and profits received by the mortgagor during the period between the confirmation of the sale and the delivery of the deed.

II

As to the scope and effect of the supersedeas bond.

The effect to be given to the supersedeas bond and the scope of the protection afforded by it to the

defendant in error and appellee, are questions to be determined by the law of the United States.

The act of Congress in this behalf directs that good and sufficient security be taken "that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution." Sec. 1000, Rev. Stat., U. S.

Rule 13 of the circuit court of appeals of the eighth circuit, following rule 29 of this court, provides that "in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of suit and just damages for delay, and costs and interest on the appeal."

In *Catlett v. Brodie*, 9 Wheat., 553, 6 L., 158, Mr. Justice Story, speaking for the court and construing the word "damages" as used in Sec. 22 of Ch. 20 of the judiciary act of 1789, Sec. 1000 of the Revised Statutes, says (page 554): "The word 'damages' is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. What-

ever losses he may sustain by the judgment's not being satisfied and paid, after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security."

The purpose of the statute and of the rules of court is to indemnify the defendant in error, or the appellee, for *whatever losses he may sustain* by the suspension of the judgment or decree. It is evident that the character and amount of these losses will depend largely upon the nature of the order which was superseded.

The order in this case confirmed a sale of real estate, directed the immediate execution of a deed thereto and delivery of possession thereof to the purchaser. Had the order not been superseded or stayed, it is plain that delivery of the master's deed and of the possession of the property would have immediately followed. It would seem clear that the natural and immediate consequence of the supersedeas was to deprive the purchaser of such possession during the pendency of the appeal and that the value of such possession, or of the rents and profits of the property, is the measure of the losses or damages thereby sustained.

The circuit court recognized these damages and allowed a recovery accordingly.

It is urged by counsel for plaintiffs in error that such recovery may not be had and that the case of *Kountze v. Omaha Hotel Co.*, 107 U. S., 378, 27 L., 609, is decisive authority in support of his conten-

tion. The rule there announced, however, is not applicable to the question now submitted to the court.

That was an action on an appeal bond given to supersede a decree of foreclosure rendered by the circuit court for the district of Nebraska, and affirmed on an appeal to this court. The court there held that a supersedeas bond given on an appeal from a *decree of foreclosure* in the courts of the United States does not operate as security for the rents and profits or use and detention of the property pending such appeal. The ground of this decision, as appears from Mr. Justice Bradley's opinion, is that the decree of foreclosure, from which the appeal was taken, gave to the mortgagee no right to the possession of the mortgaged premises, nor to the rents and profits thereof, and that accordingly, so far as such rents were concerned, the mortgagee was deprived of nothing and suffered no injury by the appeal.

As is stated by the learned Justice:

"The plaintiff, in this case, was not entitled to possession, nor to the rents and profits. His foreclosure suit did not seek possession, but sought a sale of the specific thing, the land. In such a case, until the litigation is ended, it doth not appear that there must be a sale, or even that the plaintiff is entitled to a sale. The defendant in possession is entitled to redeem the land until a sale is made, and until then he is entitled to the rents and profits, which belong to him, as of right. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him.

Waste, that is, destruction or injury to the land itself, as before stated, is an injury to the mortgagee. It diminishes the value of the pledge; and for such injury no doubt he might recover on the appeal bond. Other deteriorations, such as occur by want of repairs, accumulation of taxes, fires not covered by reasonable insurance, and the like, probably might also be fairly covered by the bond, But perception of rents and profits is the mortgagor's right until a final determination of the right to sell, and a sale made accordingly." *Id.*, pp. 392, 393; L., p. 615.

But Justice Bradley himself recognized that there may be a different rule where the judgment or order appealed from awards the possession of the property.

"The difference is this: in ejectment, the property of the land is in question, and if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him. Every dollar, or dollar's worth, is so much of the plaintiff's property, of which he is deprived. And the same is true in dower. But in the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself, the specific thing, which is pledged." *Id.*, p. 392; L., p. 615.

Indeed the reasoning employed by Justice Bradley, and the very ground of his decision, supports exactly the contrary of the contention of plaintiffs in error, namely, that such a bond WOULD cover rents and profits in a case where the judgment or decree super-

seded determined the title of real property or transferred the right of possession of the same.

In *Roberts v. Cooper*, 19 How., 373, 15 L., 687, it was questioned by this court, as stated by counsel for plaintiffs in error, whether a bond in ejectment cases covers rents and profits accruing pending the writ; but the language just quoted from the opinion of Justice Bradley, in *Kountze v. Omaha Hotel Co.*, *supra*, indicates clearly that it *does*, since "if the plaintiff has the right, he is entitled to immediate possession and to the perception of the rents and profits, which belong to him, and for which the defendant in possession is accountable to him."

And so at circuit ruled Mr. Justice Brewer, then circuit judge, in *St. Louis Smelting & Refining Co. v. Wyman*, 22 Fed., 184, where the question was squarely presented for decision.

That was an action on a supersedeas bond given in an ejectment case in the United States circuit court, and the sole question before the court was whether the bond covered the value of the use and occupation or the rents and profits of the land for the period between the judgment of the circuit court and the affirmance of the same by this court.

In the course of his opinion the learned judge says:

"But for language to be found in one or two opinions of the supreme court, I do not think there would be the slightest question.

The section of the statute, which is in Desty, (section 1000,) provides that every justice or judge

signing the citation shall take good and sufficient security that the plaintiff in error shall answer all damages and costs where the writ is a *supersedeas*. That he shall answer *all* damages! Now, when the judgment is entered in the circuit court, the right of the plaintiff to the possession of the property is established. He is entitled to the immediate possession and to the rents and profits that thereafter shall arise therefrom. If by proceedings in error and a *supersedeas* bond he is deprived of that possession, and so, pending the proceedings in error, loses those rents and profits, certainly he is damaged to that extent; and if the *supersedeas* bond is to answer all damages, it should answer for those rents and profits. I do not see any logical escape from that reasoning." *Id.*, p. 185. After distinguishing *Kountze v. Omaha Hotel Co.*, *supra*, Judge Brewer, following "the clear and unanswerable logic" of the case, held that "a *supersedeas* bond in an ejectment case covers rents and profits accruing pending the proceedings in error," and gave judgment accordingly.

The supreme court of Utah, in an action upon a supersedeas bond, given in pursuance of section 1000, Rev. St. U. S., in error proceedings to this court to review a judgment of ejectment entered by the supreme court of the territory of Utah, in construing such bond in connection with the statute and with the rules of this court, after carefully reviewing the authorities, distinguished the cases of *Roberts v. Cooper*, *supra*, and *Kountze v. Omaha Hotel Co.*, *supra*,

and approved and followed the decision of Judge Brewer in *Refining Co. v. Wyman, supra.*

Tarpey v. Sharp, 12 Utah, 383.

The supreme court of Pennsylvania, in a recent case, without having its attention directed to either *Refining Co. v. Wyman*, or *Tarpey v. Sharp*, arrived independently at the same conclusion and distinguishing *Roberts v. Cooper*, and *Kountze v. Omaha Hotel Co.*, in an action upon a bond given under said section 1000, Rev. St., and in pursuance of rule 29 of this court, to supersede a judgment in an ejectment case in the United States circuit court, held that recovery could be had of damages for the use and detention of the land pending the error proceedings.

Gleeson's Estate, 192 Pa. St., 279.

Similarly, it has been frequently held that supersedeas bonds given in the state courts, conditioned for the payment of "all damages" cover rents and profits accruing pending an appeal or error proceedings in an action for the recovery of real estate or the possession thereof.

Cahall v. Building Ass'n., 74 Ala., 539.

Hays v. Wilstach, 101 Ind., 100.

Green v. Sternberg, 15 Mo. App., 32, 35.

Turner v. Johnson (Ky.) 50 S.W., 675.

So this court, applying similar reasoning, has held that where, by writ of error and suspension bond (conditioned to answer all damages and costs), the enforcement of a judgment of ouster from office was prevented and until the writ was dismissed the relator

was excluded from the office and deprived of the salary annexed to it, the amount of the salary received by the defendant during the period of such deprivation, constitutes the measure of the damages which the plaintiff is entitled to recover upon the suspension bond.

United States v. Addison, 73 U. S. (6 Wall.), 291, 18 L., 919.

There is certainly a strong analogy between a judgment of ouster or a judgment of ejectment and a decree or order confirming a judicial sale, directing the immediate execution of a deed and the delivery of the possession to the purchaser, and it seems but reasonable to apply the same rule to each case, and to hold that the damages recoverable are measured by the value of the use and possession during the period such possession was withheld by reason of the supersedeas.

Besides *Kountze v. Hotel Co.*, *supra*, counsel cites to the same point three cases. None of these, however, supports his contention.

National Bank of Rondout v. McGahan, 45 Fed., 280, was heard on a motion to fix the amount of a supersedeas bond and holds the rule laid down in *Kountze v. Hotel Co.* to be inapplicable because the decree to be appealed from was not a decree simply for the foreclosure of a mortgage and the court there limits the authority of the latter case to an appeal from a decree of foreclosure only.

Mercantile Trust Co. v. Mo. K. & T. Ry. Co., 36 Fed., 221, 226, was decided upon an application for a

receiver in a bill filed to foreclose a mortgage. As an additional reason for granting the application Justice Brewer cites *Kountze v. Hotel Co.*, to the point that should the suit pass to a decree [of *foreclosure*] and the defendant appeal therefrom, the bond on such appeal would be no protection to the mortgagee in respect to rents and profits—a proposition which we do not dispute.

The Sydney, 47 Fed., 260, was an appeal in admiralty not from a sale but from the decree on the merits of the controversy, and the fund in dispute was in the registry of the court. As no interest had been allowed on the decree, and the costs were already provided for, the court held that the appellee had not suffered any damage by the delay.

Counsel for plaintiffs in error says—p. 15 of brief—that the defendant in the original case, Mr. Lucian Woodworth, had the right to prosecute his appeal. This is certainly true, but the appeal of itself gave no right to stay the execution of the order appealed from. To effect such a stay, the statute requires that good and sufficient security be taken, that if the appellant fail to make his plea good he will answer all damages and costs. The possession which the court awarded to the purchaser remained in the mortgagor by reason of the undertaking furnished. The bond stood in lieu of the possession, and now it is urged that because the order directing delivery of the possession was *stayed* by the bond, therefore it is as if such order had never been made. The real undertaking of the parties was to answer for the value of the posses-

sion, if appellant failed to make good his plea, as a condition to his retaining such possession.

Surely the language of the bond means something, and by it an obligation is imposed upon the signers to indemnify the appellee for whatever losses may be sustained by reason of the staying of execution upon the decree or order appealed from.

It is submitted that the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser is entitled after that order has been affirmed on the appeal to recover as damages for the breach of the obligation of the bond, the value of the use and possession, that is to say in this case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed, which was an appeal not from the foreclosure decree, but from the order of the court confirming the sale made under the decree. The question certified to this court by the circuit court of appeals for the eighth circuit, we submit, should be answered in the affirmative.

Respectfully submitted,

HOWARD KENNEDY, JR.,

Counsel for Defendant in Error and Appellee.

Supreme Court of the United States.

No. 222.—October Term, 1901.

Lucian Woodworth, Frank D. Brown, and George N. Clayton, Plaintiffs in Error and Appellants, *vs.* The Northwestern Mutual Life Insurance Company.

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[May 5, 1902.]

The question arising for decision in this cause is embodied in the following certificate from the United States Circuit Court of Appeals for the Eighth Circuit:

"The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the city of St. Louis, Missouri, on this 27th day of December, 1900, hereby certifies that upon the record on file in said court in the above-entitled causes, wherein Lucian Woodworth, Frank D. Brown and George N. Claytod are plaintiffs in error and The Northwestern Mutual Life Insurance Company is defendant in error, and Lucian Woodworth, Frank D. Brown and George N. Clayton are appellants and the Northwestern Mutual Life Insurance Company is appellee, and which causes are now pending before this court on writ of error to and appeal from the Circuit Court of the United States for the District of Nebraska, the following facts appear, namely:

"On August 26, 1896, the Northwestern Mutual Life Insurance Company filed its bill of complaint in the Circuit Court of the United States for the District of Nebraska against Lucian Woodworth and others to foreclose a mortgage given by Woodworth and his wife to said company, upon certain real estate situated in the State of Nebraska. A decree on said bill was entered on December 3, 1896, in said Circuit Court, foreclosing the mortgage, directing that a master in chancery of the court sell the premises, and upon confirmation of the sale by the court execute a deed to the purchaser, and ordering that the purchaser of the premises at said sale be put in possession thereof, and that any of the parties to said cause who might be in possession of said premises, or any person claiming under them or either of them, should deliver possession to the purchaser on production of the master's deed of said premises and a certified copy of the order confirming the report of said sale, after such order had become absolute. On February 14, 1898, said real estate was sold by the master under said decree and was purchased at said sale by the Northwestern Mutual Life Insurance Company for $39,152, a sum less than the amount of the debt secured by the mortgage and the costs in the suit. The master made his report of sale to the court on February 15, 1898. On March 15, 1898, said Circuit Court confirmed said report of sale, directed that the master convey said real estate to the purchaser

at said sale, awarded a writ of possession to put said purchaser in possession thereof and rendered a deficiency judgment for the sum of $2,696.90 and interest in favor of the Northwestern Mutual Life Insurance Company and against said Woodworth. On March 30, 1898, said Woodworth was allowed an appeal from this order of confirmation to the United States Circuit Court of Appeals for the Eighth Circuit and thereafter, on April 8, 1898, he filed his appeal bond in the sum of $5,500 with Frank D. Brown and George N. Clayton as sureties thereon, which bond was conditioned for the payment of 'all damages and costs which it (the Northwestern Mutual Life Insurance Company) may incur by reason or on account of said appeal,' and worked a supersedeas of the order of confirmation. The United States Circuit Court of Appeals on January 24, 1899, affirmed said order of confirmation of sale, and on March 29, 1899, its mandate was duly issued to, and filed in said Circuit Court. On June 19, 1899, the deficient judgment and the costs taxed in said cause in the United States Circuit Court of Appeals were fully paid and satisfied. On September 16, 1899, the defendant in error, The Northwestern Mutual Life Insurance Company, filed its petition in said Circuit Court against Lucian Woodworth, and the sureties on said appeal bond, Frank D. Brown and George N. Clayton, alleging, among other things, that the possession and use of said real estate was withheld from said company by reason of the superseding of the order of March 15, 1898, during the pendency of the appeal therefrom, that the value of such use and possession during the pendency of said appeal amounted to $3,750, and praying that Woodworth and the sureties Brown and Clayton be cited to appear and show cause why judgment should not be summarily entered against them for said $3,750 and interests and costs. On September 16, 1899, an order to show cause against said Woodworth, Brown and Clayton was made on said petition as prayed for therein, and on October 2, 1899, they filed their showing in resistance to said petition, alleging that 'damages for the rents and profits of the premises, or use and detention thereof pending appeal, are not recoverable on a supersedeas bond, and that the bond in question was not given as security, or for the payment of rents and profits, or the use or detention of the property pending appeal' and praying for the dismissal of said petition. On December 9, 1899, said Circuit Court entered a judgment and decree against the plaintiffs in error, Woodworth, Brown and Clayton, as prayed for in said petition. Afterwards, in due season, to wit, on January 31, 1900, said last named judgment and decree having been rendered on December 9, 1899, the record in the proceedings on said petition was removed by writ of error and also by appeal to the United States Circuit Court of Appeals for the Eighth Circuit, where it still remains, the cause being as yet undecided.

"And the said United States Circuit Court of Appeals hereby certifies, that to the end that it may properly decide said case, it desires the instruction of the Supreme Court of the United States upon the following question or proposition of law arising therein which is duly raised and presented by the record in said case, said question being as follows:

"Is the obligee in a bond which supersedes an order confirming a sale of real estate and directing the immediate execution of a deed and delivery of possession thereof to the purchaser, entitled after that order has been affirmed on the appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession, that is to say in this

case, the rents and profits of the real estate during the time the purchaser is kept out of the possession and use of the real estate by the supersedeas bond and the appeal in which it was allowed?"

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The question propounded is to be considered in view of the following facts: The property affected by the sale under foreclosure was situated in the State of Nebraska, the bond in question was given in a judicial proceeding in a court of the United States, and—as stated by counsel for plaintiff in error in argument—upon the affirmance of the order of confirmation by the appellate court, a deed was issued to the purchaser at the sale under foreclosure and demand was made by him for payment of the rents, issues and profits sought to be recovered by the action at bar.

As said by this court in *Nalle* v. *Young*, (160 U. S. 624, 637,) in an equity foreclosure in a Circuit Court of the United States, the requirements of the State law should be complied with and the forms of proceedings thereby prescribed pursued as nearly as practicable. This appears to have been done in the foreclosure proceedings under review, the decree of confirmation of the sale not purporting to vest title in the purchaser but containing a direction for the execution and delivery of a deed. A reference to the statutes of Nebraska, regulating sales under foreclosure, and to the decisions of the courts of that State will conduce to an ascertainment of the nature of the right or title, if any, vested in a purchaser under a sale thus confirmed.

By section 497*a* of the Code of Civil Procedure of Nebraska, it is provided that the owner of any real estate against which a decree of foreclosure has been rendered, or upon which an execution has been levied to satisfy a judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be finally confirmed. Section 498 provides for the examination and confirmation of such sale by the court. Section 499 provides that, upon the confirmation of a sale made of real estate sold on execution, the sheriff or other officer who made such sale shall make to the purchaser of such real estate as good and sufficient a deed of conveyance for the property or land sold as the person against whom such writ of execution was issued could have made of the same at the time the land became liable to the judgment, or at any time thereafter. And section 500 provides, among other things, that the deed so made shall vest in the purchaser as good and perfect an estate in the premises as was vested in the execution debtor at or after the time when the land became liable for the satisfaction of the judgment.

Construing these sections of the code, the Supreme Court of Nebraska, in *Yeazel* v. *White*, (1894) 40 Neb. 432, held that the owner of real estate

sold on execution retains the legal title thereto, and is entitled, in his own right, to the possession, rents, profits and usufruct of such real estate, until a final confirmation of the sale. In the course of the opinion the court said:

"In *Bank* v. *Green*, (10 Neb. 130,) Lake, J., speaking for this court, said: 'Under our law governing sales of real property on execution, the title of the purchaser depends entirely upon the sale being finally confirmed, and until this is done the rights of the execution debtor are not certainly divested.' And in *Lamb* v. *Sherman*, (19 Neb. 681.) Maxwell, C. J., speaking for this court, on that subject, said: 'A purchaser at execution sale of real estate upon the payment of the purchase money and confirmation of the sale becomes the equitable owner of the property, and in a proper case may compel the issuing of a sheriff's deed to himself.'"

In *Clark & Leonard Investment Co.* v. *Way*, (1897) 52 Neb. 204, the following among other facts were presented for the consideration of the court: A junior mortgagee, one of the defendants in a foreclosure suit instituted by a prior mortgagee to foreclose such prior mortgage as respected unpaid interest and the amount of certain taxes which had been paid by the prior mortgagee, became the purchaser at the sale made under the decree of foreclosure. The sale was confirmed by the court. Thereupon the mortgagor defendants appealed from the order of confirmation of sale, but, after the case was pending in the appellate court for about a year, the appeal was voluntarily dismissed. Thereafter, upon the hearing of a motion to require the purchaser to complete his bid, it was held—and the decision in this particular was affirmed by the Supreme Court of Nebraska—that on the dismissal of the appeal from the order confirming the sale the "title" of the purchaser related back, for all purposes, at least to the time of such confirmation, and the purchaser from that time was the owner of the property and liable for subsequent taxes and interest on the prior mortgage encumbrance. Further, it was said by the court: "Undoubtedly the purchaser is entitled to an accounting for rents in such a case from the time of confirmation."

The authorities just reviewed seem to be decisive of the proposition that by the local law of Nebraska, in a case like that at bar, where, upon confirmation of a sale under a decree of foreclosure, the sale is treated as perfected, credit is given to the purchaser mortgagee upon the mortgage indebtedness then due, and judgment passes for a deficiency, but the delivery of a deed is prevented, by the prosecution of an unfounded appeal from the order confirming the sale, the affirmance by the appellate court of the order of confirmation of the sale and the deed subsequently executed vest in the purchaser, by relation, as of the time of the confirmation of the sale, as well the legal as the equitable title to the land, with the right to the rents, issues and profits which accrued after the confirmation of the sale. The cases of *Orr* v. *Broad*, (52 Neb. 490;) *Clark* v.

Missouri, Kansas & Texas Trust Co., (59 Neb. 539,) and *Huston* v. *Canfield*, (57 Neb. 345,) are, however, cited as sustaining a contrary doctrine to that just announced, but, on careful examination, they will be found not to do so. In each case the right of a mortgagor to the possession of the land and the rents and profits thereof was declared to continue *until the confirmation of a sale on foreclosure*. True, in the first two cases, the right of a purchaser at a sale under execution of a debtor's interest in land, encumbered by mortgage, to the possession of the land and the rents and profits, as against a mortgage, was in effect declared to be dependent upon the acquisition of the legal title, by the delivery to the purchaser of a deed of the premises, following the confirmation of the sale. In each of the cases, however, a deed had regularly issued, and there was no claim that the mortgagor or debtor had wrongfully interfered with the passing of the legal title. There was consequently no occasion for considering or applying the doctrine of relation.

It is, however, strenuously insisted that in *Philadelphia Mortgage & Trust Co.* v. *Gustus*, (55 Neb. 436,) broad expressions were used in the opinion announced by the court which do not harmonize with the reasoning contained in the opinion in *Clark* v. *Way*. But we do not need to pass on this contention. The point for decision in the Gustus case was whether, under the statutes of Nebraska, the judgment debtor possessed the right to redeem from a foreclosure sale during the pendency of an appeal from the order of confirmation of the sale, and the Nebraska court, in holding that the right to redeem might be exercised during the pendency of the appeal, said:

"The appeal and bond, if they did not vacate the order of the District Court, superseded, suspended or rendered it inoperative. The purchaser acquired no rights, and the applicant was not devested of his title to and rights in the land. (*Tootle* v. *White*, 4 Neb. 401; *Bank* v. *Green*, 8 Neb. 297; *Bank* v. *Green*, 10 Neb. 133 942.) All things remained as before the sale and subsequent order of the District Court, and will so remain and exist until a decision in and by this court of the matter appealed. The order of the District Court, by the perfection of the appeal, became ineffectual as to all other purposes for which it was made, and it certainly does not seem unfair to say that it was not of force or effect as against the right to redeem, nor does it appear unwarranted to construe the section of the code in its reference to time to have indicated the date when the order shall become forceful and of full operation, which it cannot until this court has so decreed."

Nowhere, however, in the opinion was any allusion made to the prior decision in *Clark* v. *Way*, which we are constrained to think would have been done if the grounds for the decision in the latter case and the reasoning of the opinion in that case were deemed to be destructive of the ruling made in the earlier case. The court in the Gustus case was dealing with a judgment debtor who was seeking the benefit of a remedial statute. We

entertain no doubt that if the Supreme Court of Nebraska was called upon to determine whether or not a judgment debtor who had taken an unfounded appeal might rightfully retain the rents and profits which he had collected while in possession of the property during the pendency of such appeal, it would, in order to prevent injustice, apply the doctrine of relation, as was done in *Clark Co.* v. *Way*, and hold that the affirmance of the order of confirmation of the sale related back and gave efficacy to the original order of confirmation, as of its date, and vested in the purchaser, from that time, at least, the equitable title to the land sold and an equitable right to the thereafter accruing rents and profits.

The claim in the case at bar is for the rents and profits of the land, which accrued and were collected by the mortgagor after the entry of the order of confirmation of the sale. Upon general principles, independent of the decisions of the courts of Nebraska, we would be constrained to hold that, under the circumstances present in the case at bar, as we have heretofore detailed, the purchaser acquired as against the mortgagor, by relation, both the legal and equitable title to the land purchased, at least as of the date of the order of confirmation of the sale. This being the case, we come to consider the question as to whether recovery may be had upon a supersedas bond given in a judicial foreclosure proceeding pending in a court of the United States, of the rents and profits which accrued and were collected by the judgment debtor after the confirmation of the sale of the mortgaged property.

It has been strenuously urged that a negative answer to the question just stated is rendered necessary by the decision of this court in *Kountze* v. *Omaha Hotel Co.*, (107 U. S. 378.) This contention is based upon the following grounds: 1, That no distinction can logically be made between an appeal from an order confirming a sale had under a decree in foreclosure, as in the case at bar, and an appeal from a decree ordering a sale, as in the Kountze case; and, 2, That the mortgagor, after the sale of the land under a decree in foreclosure, is the owner of the rents and profits of such land until final approval by the court of the sale and the execution and delivery of a deed by the master. Of course, if the assumption existing in the second ground be correct, that is, that the mortgagor, despite the confirmation of the sale, is entitled in his own right to the rents and profits subsequently accruing, there would be plausibility in the claim that there was no logical distinction between an appeal from a decree of sale and an appeal from an order of confirmation of the sale. But the assumption in question, as we have shown, is not well founded, and this being the case, it results that there is a substantial distinction in the character of the two classes of decrees. In the one case, the title to the land, both legal and equitable, continues in the mortgagor; in the other,

at least the equitable title to the land and its rents, issues and profits vested in the purchaser by the sale under the decree at the time of the confirmation of such sale. In this aspect, following the reasoning in the Kountze case, the appropriation by the mortgagor, during the pendency of a wrongful appeal by such mortgagor from the order confirming the sale, of the rents, issues and profits of the land, which equitably belonged to the purchaser, was "damage" within the meaning of the statute and the condition of the bond. True, in the Kountze case the mortgagee purchaser was denied the right to recover the rents and profits which had been collected by the mortgagor intermediate the decree of sale and the actual sale of the property. But this was, because the appeal was from a decree ordering a sale, and it was held the mortgagor was not divested of the right to collect and retain the rents and profits of the land before a final determination of a right to sell and a sale made accordingly. The taking by the mortgagor of that which belonged to him and not to the mortgagee it was decided did not constitute an injury to the latter. The court, however, in its reasoning, made plain the fact that where, as in the case at bar, the real owner of the rents and profits of real estate, in whom the legal as well as equitable title had become vested before action brought upon the bond, was the party for whose benefit the bond on appeal was given, and the effect of the giving of such bond was to enable the mortgagor, the principal in such bond, to appropriate rents, issues and profits of the land during the pendency of the appeal, which equitably belonged to the purchaser, that appropriation constituted "damage" to the obligee in the bond, within the meaning of the condition for payment of "all damages and costs which it may incur by reason or on account of said appeal."

The question certified must be answered in the affirmative.

And it is so ordered.

Mr. Justice HARLAN and Mr. Justice BREWER took no part in the decision of this cause.

True copy.

Test:

Clerk Supreme Court, U. S.